SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

vs.

AMERICAN BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION No. 52-24.

Appellee moves the Supreme Court of the United States, pursuant to Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed.

The Federal Communications Commission, but not the United States of America, has filed a direct appeal from the final judgment entered March 11, 1953, by the three-judge District Court. The action was brought to enjoin the enforcement of three sets of identical Rules (which will be referred to for brevity as "the Commission's Rules" or

merely "the Rules") promulgated by the Commission and applicable respectively to the three types of broadcasting stations (AM, FM and TV).

The Commission's Rules are set forth in the amended complaint, the District Court's opinion and the jurisdictional statement. They have to do with the application of § 1304 of the Criminal Code (18 U. S. C. § 1304)—the lottery statute pertaining to broadcasting—to what are called "give-away" programs on radio and television. Paragraph (a) of the Rules declares in effect that the Commission will refuse to grant licenses or renewals of licenses to broadcasters who propose to violate § 1304. Paragraph (b), with its four subdivisions, states the various types of programs which the Commission "will in any event consider" to be violations of § 1304.

For a description of a typical give-away program—"Stop the Music"—reference is made to Exhibit A of the amended complaint.

The District Court granted a partial summary judgment in favor of the Commission, sustaining paragraphs (a) and (b) (1) of the Rules and, with Judge Clark dissenting, granted a partial summary judgment in favor of the appellee, enjoining enforcement of subdivisions (2), (3) and (4) of paragraph (b).

Opinions Below

Since the filing of the Commission's appeal, the Opinion of Judge Liebell for the District Court (Judge Weinfeld concurring) and the dissenting opinion of Judge Clark have been reported. 110 F. Supp. 374.

History of the Proceedings

The Commission promulgated the Rules in reliance on its rule-making power under the Communications Act, 47

U. S. C. §§ 154(i) and 303(r). For a history of the proceedings leading up to the promulgation of the Rules, reference is made to paragraphs 7 to 10 of the amended complaint.

The Commission's order provided that the Rules would go into effect on October 1, 1949. On August 31, 1949, appellee filed its complaint in this action. On September 23, 1949, on appellee's motion, Judge Rifkind issued a temporary restraining order and set down the application for an interlocutory injunction for hearing before a three-judge court. Thereupon the Commission, on its own motion, postponed the effective date of the Rules until 30 days after final decision in this and co-pending actions, and the application for an interlocutory injunction became moot.

Discussions between counsel for the Commission and counsel for appellees in this and co-pending actions were carried on from time to time over a three-year period, with a view to working out a convenient procedure for putting the issues before the District Court. An agreement was reached, and pursuant thereto amended complaints were prepared in the several actions and the amended complaint in this case was filed on September 22, 1952. On the same day appellee moved for summary judgment, on the complaint, a supporting affidavit and a stipulation with defendants' counsel, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment.

The allegations of the amended complaint were not denied by the defendants, and the statements of fact in the affidavits of either side were not controverted by the other. Thus the facts were agreed upon and the issues of law submitted to the District Court.

Decision of the District Court

The decision below may be summarized as follows:

(a) The Court held that the Commission had power to announce in advance by rule that it would refuse to grant or renew licenses to broadcasting stations which proposed to follow or to continue to follow a policy of violating § 1304.

(b) It held that one of the tests laid down by the Commission for determining whether particular programs would violate § 1304—the test laid down in paragraph (b) (1) of the Rules—was in accordance with § 1304, and that that provision of the Rules was a valid exercise of the Commission's power.

(c) It held, Judge Clark dissenting, that the other three tests laid down by the Commission for determining whether particular programs would violate § 1304—the tests laid down in subdivisions (2), (3) and (4) of paragraph (b)—were not in accordance with § 1304, and that those provisions of the Rules were beyond the scope of the Commission's power. It reached that result by finding that, in the cases covered by those subdivisions, the element of "consideration", in the sense of the lottery statutes, was not present.

Questions Decided Below But Not Raised Before This Court

In the District Court, appellee contended that the Rules as a whole were invalid, on the grounds (1) that the Commission did not have power to add new sanctions to those provided by Congress for enforcement of the lottery laws and (2) that, in carrying out the Congressional mandate to grant licenses according to "public interest, convenience and necessity", the Commission could not properly isolate a single factor—a violation of the lottery laws—and make

it solely determinative of the right to a license, regardless of all other factors affecting the public interest, convenience and necessity. *Cf. Waite* v. *Macy,* 246 U. S. 606.

The District Court decided against appellee on those issues, and they are not before this Court, appellee not having appealed.

Appellee also contended in the District Court that paragraph (b) of the Rules was invalid as a whole, because the body of the paragraph (as distinguished from the numbered subdivisions) departed in certain respects from the definition of "lottery" laid down in the decided cases. Particularly it was argued that the element of "chance"—one essential element of a lottery—means chance governing the selection of the winner, and does not comprehend—as paragraph (b) might be construed to comprehend—chance in the selection of the *participants,* where the selection of the *winner* from among the participants is determined by skill or knowledge, and not by chance. The statute condemns schemes "offering prizes dependent . . . upon lot or chance"; and it is the award of the prize, rather than the selection of those who contest for the prize, that must depend on chance, as we read the decided cases.[1] Appellee also argued below that subdivision (1) also departed from the definition of "lottery" as laid down by the decided cases.

The District Court, however, upheld paragraph (b)(1) as a whole, thus ruling contrary to appellee on both issues

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[1] An illustration would be a spelling bee, where the contestant from each school was chosen by lot, the prize obtained by money contributions from the several schools, and the prize awarded to the speller who lasted until all others had gone down. Under the decided cases, though "prize" and "consideration" (money contributions to the prize) were found to be present, there would not be a lottery because the winner was not determined by "chance" but by skill. *People* v. *Mail & Express Co.,* 179 N.Y. Supp. 640, *aff'd,* 192 App. Div. 903, *aff'd,* 231 N.Y. 586, is a leading case on the point.

last mentioned; and the validity of paragraph (b)(1)—the body of paragraph (b) taken in conjunction with its first subdivision—is not before this Court.

However, the Commission's appeal does raise all questions bearing on the validity of the body of paragraph (b) taken in conjunction with subdivisions (2), (3) and (4); and therefore, in the event that the Court shall determine to receive briefs on the merits and hear argument on the Commission's appeal, the question of "chance" may become one of the issues bearing on the validity of subdivisions (2), (3) and (4) of paragraph (b).

At this time, since the Commission has stated the question before the Court solely in terms of "consideration", we will confine our argument to that question. But we desire to reserve the right, if our motion to affirm shall be denied, to argue the question of "chance" and all other questions that may bear on the issues that will then be before this Court.

The Commission's Statement of the Issue

The Commission has stated in the following terms the question which it asks this Court to decide:

> "Whether subdivisions (2), (3) and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304".

Reference to subdivisions (2), (3) and (4) will show what the Commission means by "required or induced attention" to programs. Subdivision (2) is the case of "required" attention. It covers programs which the contestant must be listening to or viewing in order to win the prize.

Subdivisions (3) and (4) are cases of "induced" attention. They cover types of contests where, in order to win,

the contestant must answer a question correctly, or answer the telephone or write a letter "in a prescribed manner or with a prescribed phrase". Apparently the Commission presumes that, if aid to answering the question, or learning the "prescribed manner" or "prescribed phrase", could have been obtained by listening to a previous program, "the winner or winners" will have listened to it.

In all the cases comprehended by subdivisions (2), (3) and (4), the Commission finds the element of consideration in "detriment to the promisee" (the winner or winners), consisting of their giving time and attention to a radio program, and "benefit to the promissor" (the program sponsor), who is presumed to gain a listening audience made up of contestants for the prize.

We say "presumed", because the Commission has not attempted to say—nor, so far as we know, to find out—how much of the listening audience for any particular "give-away" program is made up of persons who hope for a prize, and how much is made up of individuals who, without hope for a prize, enjoy the fun of hearing and seeing others exercise their wits and win—or lose.

The Commission has not taken any evidence or made any finding that give-away programs are harmful to the public in any respect. It constructed its rules, and has defended them, solely upon its own interpretation of what is a lottery under § 1304.

Grounds for Appellee's Motion

The grounds on which we now ask for affirmance of the judgment below are:

1. The District Court's decision on the question of "consideration" is in accord with the overwhelming weight of authority and with the uniform construction of the lottery statutes by the Federal Courts and by the Government

agencies concerned with enforcing the lottery laws—the Department of Justice and the Post Office Department.

2. The question which the Commission asks this Court to review is not of a character or an order of importance which justifies the attention of this Court.

Point I—The District Court's Decision on the Question of Consideration Was Correct

It seems unnecessary to review the authorities on the question of consideration as an element of a lottery, in view of Judge Leibell's comprehensive presentation of the authorities in his opinion in the District Court.

The role which the Commission assumes before this Court is an extraordinary one and, we submit, quite without precedent. Section 1304 (formerly § 316 of the Communications Act) has been in force since 1934. The statute on which it is modeled—§ 1302, which applies to the use of the mails the same prohibition as § 1304 applies to broadcasting—has been in effect in substantially its present form since 1872 (R. S. § 3894).

So far as the available records indicate, during 81 years under the postal statute and 19 years under the radio statute, no Federal Court decision or postal ruling has condemned a person, or denied him the use of the mails, for conducting a lottery where the consideration was a technical "detriment to the promisee" or "benefit to the promissor", or anything else except a tangible and valuable consideration paid by contestants, to whom "a chance for a prize for a price" had been offered (opinion below, 110 F. Supp. at 385).

During those respective periods of 81 and 19 years, the Post Office Department and the Department of Justice have uniformly construed the lottery statutes as they have been construed by the District Court. They have construed

those statutes in the light of the mischief at which they are aimed, which is gambling—the hazarding of money on the chance of drawing the winning lot. *Cf. Commonwealth* v. *Wall,* 295 Mass. 70.

In the face of that uniformity of construction, in the light of the almost unanimous decisions of the courts throughout this country, and further in the face of the rule of strict construction applicable to criminal statutes, a District Judge would be bold indeed to permit a defendant to be convicted under § 1304 on the theory of consideration which the Commission has propounded.

The Commission, however, asks this Court to permit it—an administrative body not charged with the prosecution of crimes—to re-interpret the lottery statutes so as to make criminal a variety of courses of conduct that have been considered innocent in the past.

It is not to be wondered that the Department of Justice has declined to join in the Commission's appeal to this Court.

The record in this case includes an affidavit of G. B. Zorbaugh, filed on appellee's motion for summary judgment, which shows that the Commission's Rules are contrary to the only case (*Clef, Inc.* v. *Peoria Broadcasting Company,* unreported [2]) where the issue of give-away programs as lotteries was squarely presented; that they are at variance with the interpretation placed by the Solicitor of the Post Office Department on the postal lottery laws, with respect to the mailing of information concerning such programs; that they proscribe as lotteries programs that have been known to the Department of Justice for many years, and against which that Department has consistently refused to take action; and that they assume in the Com-

[2] Eq. No. 21368, C.C. Peoria County, Illinois, decree entered November 21, 1939; see opinion below at p. 380.

mission a breadth of authority which its own Chairman in 1943 believed it did not have.

Point II—The Question Which the Commisison Asks This Court to Review Is Not of a Character or an Order of Importance Which Warrants the Court's Attention.

Construction of a criminal statute, especially one—to use the language of the dissenting judge—that has the character of "sumptuary or moralistic legislation", and is an attempt "to enforce moral precepts which to a large part of the community seem strange and excessively puritanical" (110 F. Supp. at 391 and 393), is peculiarly a matter to be left to the courts, to be worked out from case to case in the light of community standards and a showing of evils that are fairly within the mischief at which the statute is aimed. The Commission is asking this Court to substitute for that process of statutory construction a sweeping re-interpretation of § 1304 by an administrative body—a re-interpretation in the broadest terms, and in terms that are far from being unambiguous, as a reading of paragraph (b) with its subdivisions (2), (3) and (4) will quickly show.

The Commission, in fact, is asking this Court to utter a wholesale declaratory judgment defining crimes under § 1304, and on a record from which the Court can have no way of estimating how far the effect of such a judgment might go, in terms of its application to conduct not heretofore regarded as criminal. For all that can be determined from the record in this case, a decision in favor of the Commission might multiply a hundred-fold the ridiculous situation caused by a departmental misconstruction of the Postal Lottery Law, which caused an uproar in Congress and led to the passage of 18 U. S. C. § 1305, specifically legalizing fishing contests. It is submitted that the Commission's

appeal is so clearly lacking in merit that this Court can and should affirm on the jurisdictional statement.

There may be differences of opinion as to the influence of give-away programs in the cultural life of this country. They have waxed and waned in popularity. They have been defended as a harmless type of entertainment that the public likes, and they have been attacked as "not good broadcasting", because "listeners are attracted not by the quality of the program but simply by the hope of being awarded a valuable prize . . ." (Opinion below, at 388-389, note 7). When such programs were at the height of their popularity, about the time the Commission's rules were promulgated, the Commission, as we understand, was under some pressure from members of Congress to do something to discourage or put a stop to them. At the moment they are not especially popular, and not much is heard about them.

But whatever their merits or demerits may be, Congress has not given the Commission authority to prohibit them, and it may not acquire that authority by assimilating the programs to lotteries through a re-interpretation of § 1304. On the other hand, if such programs—though not involving lotteries—do involve broadcasting practices that can be shown to be contrary to the public interest, convenience or necessity, the Commission may take that fact into consideration in granting or withholding licenses.

For that reason it is submitted that the Commission's appeal does not involve any important questions of public regulation or administrative law or procedure. If give-away programs, or some of them, are in conflict with the standard of public interest, convenience or necessity, then on proof of that fact the Commission may take appropriate action; and it does not need to rewrite a criminal statute in order to exercise the full measure of its authority. On the

other hand, if the programs are not in conflict with the statutory standard, then it is no business of the Commission's to suppress them. From this standpoint it is submitted that the Commission's appeal has so little substance that it might well be dismissed by this Court on the jurisdictional statement.

Opinion of the Dissenting Judge

Judge Clark, dissenting below, would disregard the prevailing authorities on the question of consideration, because "courts and writers have found or created confusion and doubt"; but then he proceeds to deal at some length with the only two cases of any consequence that run counter to the prevailing authorities. Those cases he considers "most apposite", and also "well reasoned." Criticism of them in legal periodicals he finds to be "a masterpiece of unreality", "tendentiously critical remarks" and a "bromidic statement" (110 F. Supp. at 393). He finds that the majority of the court have been "drawn away from the natural answer" to the question of consideration by an "odd mistake" and "an over-precise formulation of the issue", and that they have given the statute an application which "quite inverts the requirement [consideration] and makes it meaningless and irrational." He explains the "confusion" that he finds in the decisions on the ground, already mentioned, that the lottery laws involve "attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical." Then he goes on (at 393):

> ". . . The analogy of the Prohibition Amendment is close. Since the law seems harsh, a search most diligent is made to cut down its more drastic operation; in fact, the mind seems to revolt at enforcement of its harsher elements. That, I think, is the real meaning. If people want to waste their time in listening to radio

programs in the hope or off-chance of winning some valuable prizes, why not let them do it. That is a widespread attitude, with which, of course, I have considerable sympathy. But I think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unliked, prohibition into one which is unintelligible. After all, the fate of the Prohibition Amendment showed the proper eventual remedy."

One might search far and wide among judicial opinions to find a more remarkable suggestion. The dissenting judge would reverse a line of statutory construction going back more than a half century, in order to create a situation—"understandable, if unliked"—that might be remedied by repeal or amendment of the statute.

When the dissenting opinion is analyzed, it is found to advance only a single proposition, *viz.*, that the concept of consideration in the law of contracts should be carried over into the lottery laws, where the three essential elements of a lottery have always been found to be "prize, chance and consideration." No reason of principle or public policy is advanced to support that thesis. Nor is any consideration of practical necessity mentioned. On the contrary, it is suggested in the opinion that the lottery laws, if thus construed, may ultimately meet the fate of the Prohibition Amendment.

The only reason for the proposition of the dissenting judge that is advanced to the stage of lucidity is that it is absurd to hold, on the one hand, that a lottery is present if the contestants pay so much as a penny each to the man conducting the game, but to hold that no lottery is present where the contestants give the program sponsor the benefit of their time and attention, which is what every radio advertiser wants and pays to get—and presumably derives benefits from.